In The

Supreme Court of the United States

October Term 1976

No. 75-1693

STANLEY BLACKLEDGE, Warden,
Central Prison, and
STATE OF NORTH CAROLINA,
Petitioners,

V.

GARY DARRELL ALLISON,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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STATUTORY PROVISIONS INVOLVED

NORTH CAROLINA:

§14-2. *Punishment of felonies.* — Every person who shall be convicted of any felony for which no specific punishment is prescribed by statute shall be punishable by fine, by imprisonment for a term not exceeding ten years, or by both, in the discretion of the court.

§14-54. *Breaking or entering buildings generally.* — (a) Any person who breaks or enters any building with intent to commit any felony or larceny therein is guilty of a felony and is punishable under G.S. 14-2.

§14-55. *Preparation to commit burglary or other housebreaking.* — If any person . . . shall be found having in his possession,

without lawful excuse, any picklock, key, bit, or other implement of housebreaking; . . . such person shall be guilty of a felony and punished by fine or imprisonment in the State's prison, or both, in the discretion of the court.

§14-89.1. *Safecracking and safe robbery.* — Any person who shall by the use of explosives, drills, or other tools unlawfully force open or attempt to force open or "pick" the combination of a safe or vault used for storing money or other valuables, shall, upon conviction thereof, receive a sentence, in the discretion of the trial judge, of from ten years to life imprisonment in the State pentitentiary.

UNITED STATES:

28 USC 2246 is set out on p. 2 of the Petitioners' Brief.
28 USC 2255 is set out on p. 4 of the Petitioners' Brief.

SUMMARY OF ARGUMENT

A hearing on Allison's claim was properly rejected by the District Court because it was inherently improbable and was refuted by the inquiry at the time of his plea, which inquiry Allison has not shown to be unreliable. The improbability of his claim is demonstrated by the few recorded instances of broken plea bargains and by the disproportionate number of these claims dealing with alleged promises for sentences by persons unable to make good on them, such as District Attorneys and law enforcement officers. The reliability of his inquiry is demonstrated by two facts. First, the attacks on the form of inquiry used in his case are based on information which is both dated and misinterpreted. Second, the attacks on the reliability of Allison's particular inquiry — the absence of a verbatim transcript, the possibility that Allison's lawyer discussed the inquiry with him, an undocumented charge of large scale wrongdoing by the defense bar, and the possibility the charges were dropped — are not strong considerations either generally or in Allison's case.

Allison's argument that the District Courts and the State

will not be burdened by a result in his favor because North Carolina has changed its form of inquiry on plea bargains should be rejected. It is made in disregard of the great number of prior pleas in North Carolina which will be affected, as well as the great number of pleas in four other circuits not honoring this type of claim presently; is based on incorrect assumptions concerning State legislative history; and is both premature and unsubstantiated insofar as it touts North Carolina's new inquiry as a cure-all.

Allison's opposition to the use of affidavits is not based on substantial grounds. The magistrate's assumption that an affidavit could be obtained was warranted at the time his Order was entered, and he wisely did not involve the State's lawyers in getting the affidavit for Allison. Allison's characterization of the use of affidavits as an administrative convenience and a badge of insensitivity is wholly inaccurate and his assertion that their use would swamp the federal appellate division is unwarranted.

ARGUMENT

I

ALLISON'S ARGUMENT THAT HE IS ENTITLED TO A HEARING BECAUSE THE IMPROBABILITY OF HIS OWN CLAIM IS OF NO CONSEQUENCE AND THE PRIOR STATE HEARING WAS UNRELIABLE ARE CLEARLY INCORRECT AND SHOULD BE DISREGARDED.

Allison argues that he is entitled to an evidentiary hearing because the improbability of his claim is of no consequence and because the State's proceeding was unreliable. This is incorrect.

His assertion that any improbability surrounding his claim should not be a consideration is definitely wrong. It has been mentioned as a consideration in several cases, *Machibroda v. United States*, 368 US 487, 495-496 (1962); *Townsend v. Sain*,

372 US 293, 317 (1963); *Sanders v. United States*, 373 US 1, 21-22 (1963), and because it is a consideration, the improbability of this type of claim should be fully realized. It is shown to some extent by the fact Allison has cited only two reported instances where a hearing on this type of claim bore fruit. The State's search has yielded few others.[1] This is a meager yield indeed when all the guilty pleas in all jurisdictions in this country in all the years pre-plea inquiries were required or used are considered (over 116,000 in North Carolina alone before the 1974 change in plea forms). The improbability of the claim is further shown by the fact that the complaint is almost always that a District Attorney did not do that which he had no power to do, e.g. obtain a sentence for a certain term or a suspended sentence. Certainly if a fair number of broken plea bargain claims were true, it would be expected that District Attorneys would be equally attacked for having failed to carry out promises to do what they could do, e.g. reduce charges, dismiss them, or recommend sentences. However, there are few claims of this type.[2] Finally, the improbability of this type claim being true is brought home by *Mosher v. Lavallee*, 491 F2d 1346 (2 Cir 1974) where the District Court had found such a breach. In that case, the Circuit Court said:

"The instant case is the rare one — unique in this

1 *White v. Gaffney*, 435 F2d 1241 (10 Cir 1970); *Johnson v. Beto*, 466 F2d 478 (5 Cir 1972); *United States v. Ewing*, 480 F2d 1141 (5 Cir 1973); *State ex rel Clancey v. Coiner*, 179 S.E.2d 726 (W. Va. 1971); *United States ex rel McCant v. Brierly*, 304 F Supp 561 (ED Pa 1969).

2 Of the forty plus cases cited in the State's leading brief at pp. 15-18, it appears that only four charged an official with not carrying out a promise on which he could deliver: *Bryan v. United States*, 492 F2d 775 (5 Cir 1974) (judge failed to give concurrent sentence); *United States v. Frontero*, 452 F2d 406 (5 Cir 1971) (judge failed to give suspended sentence); *United States v. Lester*, 328 F2d 971 (2 Cir 1964) (District Attorney failed to nol pros other charges); *McAleney v. United States*, 539 F2d 282 (1 Cir 1976) (District Attorney failed to make sentence recommendation).

> Circuit so far as we know — where [there was] . . . a false statement by defense counsel . . . that a promise had been made . . .", Id. at 1348.

Therefore, in light of the improbability of this type claim, and the fact that the improbability of a claim is a factor to be considered in granting a hearing, the District Court made the proper decision in this case.

Allison also claims that the State Court plea proceeding was not so searching as federal inquiries, and therefore was unreliable in a legal sense because the more searching federal inquiries are subject to collateral attack. However, as pointed out in the State's leading brief, differing statutory requirements dictate a different result as between federal and state review. Moreover, no such general criticism of North Carolina's proceeding can be made. This type of arraignment in North Carolina is a sworn proceeding, has a minimum set format, and historically has covered at least the following: competency at the time of plea; understanding of the charge; understanding of the right to plead not guilty and have a jury trial; a canvass of the reasons which might contribute to the plea; understanding of the punishment possible; ability to prepare a defense; and allocution by the accused. By contrast, FRCrP 11 inquiries have historically been unsworn; have not been required to deal with mental competency at the time of plea or ability to prepare a defense; and have followed no particular format. All of these tend to make it a proceeding which gives more uneven results than are obtained upon a plea in the Courts of the State of North Carolina. Therefore, this argument does not show that North Carolina's procedure has been relatively less reliable than the procedure of the United States District Courts.

Allison further asserts the State proceeding did not decide the issues of fact tendered — a bargain and its cover-up — and that this provides another reason the hearing was unreliable. In this regard, he contends that it is *Catch-22* and difficult to

use the state court findings because they were made before the alleged breach. This ignores the authorization to utilize implied findings of fact, *Townsend v. Sain*, supra, at 314. It is such a finding which defeats Allison's argument, because it is beyond question that a plea bargain, plea arrangement, plea agreement, or whatever else the rose may be called requires a promise from the State in exchange for an act by an accused. As one writer has put it "promises are central to plea bargaining".[3] Therefore, when an accused says there is no promise, then necessarily there is no plea bargain. If there is no plea bargain, then there cannot be the breach of one. Accordingly the State inquiry did reach the issues involved in this case, and is not unreliable for failure to do so.

Allison further attacks the State hearing on the ground that disclaimers of promises are inherently unreliable, cites Trebach, *The Rationing of Justice* (1964), and speaks of judicial recognition of this. Such criticism is found in both law reviews[4] and cases[5] but it has been uncritically passed on from author to author without examination. The sources for this assertion (when any are cited) are four — D. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* (1966);

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3 Carmen L. Gentile, "Fair Bargains and Accurate Pleas", 49 B.U. L. Rev. 514, at 518 (1969).

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4 Carmen L. Gentile, "Fair Bargains and Accurate Pleas", 49 BU L. Rev. 514, 518 (1969); J. N. Bongiovanni, Jr., "Guilty Plea Negotiations", 7 Duquesne L. Rev. 542, 548 (1969); Kenneth A. Kraus, "Plea Bargaining: A Model Court Rule", 4 U. Mich. J.L. Ref. 487, 489 (1971); S.M. Davis, "The Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy", 6 Val. U. L. Rev. 111, 119 (1972); Note: "The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas", 1970 Washington U. L.Q. 289, 312 (1974); Robert L. Heath, "Plea Bargaining: Justice Off the Record" 9 Washburn L.J. 430, 435 (1970).

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5 *Walters v. Harris*, 460 F2d 988 (4th Cir. 1972); *Scott v. United States*, 419 F2d 264 (D.C. Cir. 1969); *United States v. Jackson*, 390 F2d 130 (7th Cir. 1968) (dissent); *Harrell v. United States*, 371 F2d 160 (7th Cir. 1967) (dissent).

Task Force Report: The Courts (1967); Remington, et al., *Criminal Justice Administration: Materials and Cases* (1969); and Trebach, *The Rationing of Justice* (1964). Examination of these sources gives much less cause for alarm than appears from the use to which they are put.

Trebach writes with the avowed purpose of showing how rights are violated and how often and his book is a distillation of his experiences in New Jersey in the 1950's. His quoted words come from a final sub-part in the guilty plea chapter entitled "A Few Fateful Words" in which he references such things as police beatings. His observations are undocumented, and in view of his avowed purpose, it is little wonder that he says what he does. However, examples contrary to his assertion that defendants will never speak up in court appear in several reported cases, e.g. *Ross v. Wainwright*, 451 F2d 298 (5 Cir 1971); *United States ex rel Culbreath v. Rundle*, 466 F2d 730 (3 Cir 1974); *Paradiso v. United States*, 482 F2d 409 (3 Cir 1973); *United States ex rel McCant v. Brierly*, 304 F Supp 651 (ED Pa. 1969); *People v. Wheeler*, 67 Cal Rptr 246 (1968). Remington states that summary questioning by a court is not likely to disclose the real circumstances underlying a plea "since it is understood as a part of the bargain that the defendant should deny the plea is the result of either threat or promise" (p. 561). This statement is undocumented, although it appears to have been case in Trebach's state, see Note: 1970 Washington U. L. Q. 289, 315 (1970). The Task Force Report contains two relevant sections — a four page subsection of the first chapter entitled "The Negotiated Plea" and an appendix article "Perspectives on Plea Bargaining" by Arnold Eaken. In the first of these, its writers say that the prosecutor and defendant must ordinarily deny promises (p. 9) citing *Shelton v. United States*, 242 F2d 101 (5 Cir 1957) as authority. In the second of these, Eaken expresses concern with a "system that requires the defendant to deny negotiations" (p. 111). He candidly states that he cannot document his comments and describes them as impressions and observations accumulated

during several years of criminal practice (p. 115), apparently as a federal district attorney in New York City in 1960-63. Newman's book is a survey of guilty pleas procedures in three mid-western states — Wisconsin, Michigan and Kansas — in 1956 and 1957. He states only that in no observed instances "did a general question on promises elicit that a sentence had been promised by a prosecutor" (p. 50). His methodology is not set out but, in any event, his observation is unremarkable because the prosecutor ordinarily would not be expected to promise a sentence.

Several salient facts stand out from the above. The first is that these opinions are dated ones, some reaching back twenty years. The second is that the criticism of the no-promises inquiry is based on only one look into its yield, and the information there reported was unremarkable.[6] The last is that these opinions are based on the fact that large scale plea-bargaining existed in some jurisdictions where it was prohibited and therefore denial was required. However, Allison has pointed to no such prohibition in North Carolina, nor has the undersigned found any; and in any event, there was no prohibition at the time of Allison's plea. Therefore, the general criticism of this type of format has little, if any, applicability to North Carolina pleas in general and Allison's plea in particular.

Finally, criticism of plea proceedings is not persuasive when it is consistered that this Honorable Court probably rejected similiar criticism in coming to its decision in *Boykin v. Alabama*, 395 U.S. 238 (1969). In that case, the court viewed the inquiry by a neutral judge, the open-court atmosphere, the probability of the Judge's good faith, and his independent ability to determine credibility to be sufficient for a reliable

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6 The authors of "The Trial Judge's Satisfaction as to Voluntariness and Understanding of Guilty Pleas", 1970 Washington U. L.Q. 289, (1970) surveyed thirty-five pleas in the St. Louis area as a part of their research and stated that in each case the defendant stated that no promises had been made. This seems to be the only subsequent follow-up on this matter.

determination in the normal case. For this additional reason, the criticisms previously mentioned ought not control the court's decision in this case.

Allison also argues that the hearing was unreliable in this case because there might have been more to the proceeding than meets the eye and a verbatim transcript is not before the Court. However, it can reasonably be assumed that had any plea bargaining or sentence representation been mentioned in court and had Allison been unhappy with the result, he would have complained then for the matter would have been out in the open and there would have been no reason to remain quiet; and that he would have mentioned this in his writ, which he has not. Therefore, the absence of the verbatim transcript creates no infirmity in accepting the form transcript in this case.

Allison also asserts unreliability because there "was" a common practice in North Carolina for lawyers to go over the form transcript with their clients, for judges to suggest this, and for judges to sometimes wait for the advice to be given by the lawyer to the client with regard to particular questions. The State also has seen some transcripts which contain this, but presumes it still goes on. It is no more sinister than the trial preparation of any other witness; is perfectly valid; and, in fact, would be the expected. Therefore, it is a far jump from this fact to the implied proposition that the answers given are necessarily false or likely to be so. No such conclusion can reasonably be drawn unless it is assumed that a gigantic tripartite conspiracy exists to falsify court records. The State contends this is not a substantial likelihood and, accordingly, the proceeding is not unreliable because of the above assertion by Allison.

In the same vein, Allison also asserts unreliability because the state's criminal lawyers allegedly have exceptional talent and capacity for guile. He complains that many an unlearned defendant has been convinced by them that a plea bargain is

not a promise or the court does not mean a plea bargain when it says a promise. He continues by charging that the whole affair is a sham. However, like most assertions of this type, it is undocumented. Against Allison's jaundiced opinion of the state's defense bar, the State will match the more longstanding opinion of Judge Craven as set out at p. 19-20 of its leading brief, in which the Judge generally spoke well of the bar in the five states comprising the Fourth Circuit. Therefore, this argument by Allison does not indicate any unreliability in the State's plea proceeding.

Allison further asserts the State cannot claim the record in the case conclusively shows no consideration was given for the plea because two charges against him were dismissed. This is true. However, the conclusive standard applies to attacks on federal convictions under 28 USC 2255, and the question is the reliability of the proceeding in terms of the charge made against it, i.e. a bargain for a particular sentence, not its reliability in terms of every hypothetical line of attack. Although the State cannot vouch that the District Attorney did not drop two other charges as an accommodation either to Allison or his lawyer, their dismissal is consistent with the absence of any plea bargain. Charges are usually dropped as a part of a plea bargain when they have a parity with the undropped charges. This is because the defense gets a substantial benefit in exchange for its plea, and the State gets the benefits of a plea — a sure conviction and a fast trial. However, in this case, since the plea was to attempted safecracking, it is fairly obvious that the State had a sure conviction in any event for that was the highest offense in terms of punishment. In 1972, it carried a penalty of from ten years to life imprisonment, G.S. 14-89.1, while the two companion charges each carried ten year maximum penalties, G.S. 14-54, G.S. 14-55, G.S. 14-52. In light of this disparity, there was no substantial prosecution purpose in obtaining a plea on the two remaining charges. Also there was no substantial defense purpose in obtaining a dismissal of them. This is because if the trial judge were of a mind to throw the book at Allison, he could do no more in 1972 as a practical matter than to give him life imprisonment.[7] On the other hand, if the trial judge were of a mind to be lenient, arraignment on all counts would yield nothing but concurrent sentences or a consolidated one. Therefore, this absence of a real benefit to Allison, plus his failure to note it either at the time of his plea or in his writ strongly suggests that the dropping of the two charges was not pursuant to a plea bargain. Instead, the guilty plea here is way more likely to have exemplified what Eaken described in his article as a "tacit bargain [where] there are no formal explicit negotiations between the defense and the prosecutor. Defendant, aware of an established practice in the court to show leniency to defendants who plead guilty, pleads guilty to the charges in the expectation that he will be so treated" (p. 111). This is referred to by Newman as an "implicit bargain" (p. 60) and is the other side of the coin of "the most common form of plea bargain [which] involves no promises by the prosecutor at all. The county attorney merely lets the defendant or his attorney know that if the case goes to trial, he will 'throw the book' at the defendant and push for the most severe sentence possible."[8] Viewed from these perspectives, the dismissal of two charges does not undermine the reliability of the State court determination in this case.

In light of the foregoing arguments, the State again contends that the District Court's decision was proper due to the improbability of petitioner's claim, and the reliability of the State court proceeding refunding it; and its decision should be endorsed.

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7 Parole consequences would be different today and would provide a stronger basis for a plea bargain in this context. However, in 1972, a life termer was reviewed for parole at the end of ten years, and that was also the maximum waiting period for review for any term of years as well.

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8 Shelton C. Williams "Discretion Exercised by Montana County Attorneys in Criminal Prosecutions", 28 Mont. L. Rev. 41, 52 (1966).

II

ALLISON'S ARGUMENTS ON THE ABSENCE OF ANY BURDEN BY VIRTUE OF A FAVORABLE DECISION TO HIM AND ON THE EXISTENCE AND MEANING OF STATE LEGISLATTIVE HISTORY ARE CLEARLY INCORRECT AND SHOULD BE DISREGARDED.

Allison next contends that a decision in his favor will not burden District Court or the State because the State has modified its plea taking procedure to expressly advise an accused that plea bargaining may be revealed. This conclusion is speculative.

Allison first asserts that the form change will limit the impact of a favorable decision for him. This is true — it will be limited to the 116,000 pleas taken before February 1974 and some part of the 50,000 plus pleas taken between February 1974 and September 1976, when a single form was used again for taking all pleas, plus whatever number it applies to in the Fifth, Sixth, Seventh and Tenth Circuits. Therefore, this modest limitation should not be accepted as a basis for decision by this Honorable Court.

Allison also urges that if the Court does not decide the case in his favor, it will be telling the law makers of North Carolina and its court administrators that they have done a useless act in changing transcript forms. This is incorrect for each change had, at the least, a temporary usefulness. The first change was in response to the possibility of the Fourth Circuit applying *Walters v. Harris*, 460 F2d 988 (4 Cir 1972) to state proceedings, which it ultimately did in *Edwards v. Garrison*, 529 F2d 1374 (4 Cir 1975); and the second was to use more simple words in order to avoid possible complaints by prisoners that they did not understand the *Walters v. Harris, supra* language. Both changes were pushed by the Attorney General's Office and were not the consequence of any legislative mandate. Speaking for the Office, the undersigned would welcome the

news that the action had been unnecessary. Accordingly, Allison's suggestion in this regard should not concern the Court.

Allison also charges that the form change is an acknowledgement that the earlier proceeding was unreliable. This type of argument is often held to be against public policy because it discourages change or other beneficial activity. In any event, it has no force in this context because the change in forms was no more than an acknowledgement that the United States District Courts would have the last say on the validity of pleas and therefore inquiries had to be tailored to what the Fourth Circuit would require those courts to look to. In light of this, Allison's argument in this regard is wide of the mark.

Finally, Allison's assertion that his case will not govern future cases under the different form of inquiry is certainly a premature judgment for two reasons. First, since making the inquiry in *Walters v. Harris, supra*, conclusive, the Fourth Circuit may have backtracked in *Edwards v. Garrison, supra*, in which it apparently held that arraignment statements bind an accused only so long as he fails to state his lawyer did not tell him to lie. Second, Allison does not say why Mr. Trebach's quotable words, the North Carolina defense bar's exceptional talents in the art of subtle distinction, or the fact that a preprinted form is used will not justify a hearing in the future despite the new procedure. If the reason is that plea bargaining is now considered proper, the answer to this is that it has generally been considered proper since the mid-1960's, *Cortez v. United States*, 337 F2d 699 (9 Cir 1964); *Cooper v. Holman*, 356 F2d 82 (5 Cir 1966), if not before; and any doubts on the matter were laid to rest by *Brady v. United States*, 397 US 742 (1970). Therefore, no predictions about the impact of North Carolina's plea change can be reliable at this time.

In light of the above, Allison's claim that no burdens will arise from a decision in his favor is unwarranted, and should not be a basis for decision in this case by this Honorable Court.

III

ALLISON'S MANY ARGUMENTS THAT THE MAGISTRATE'S REQUIREMENT OF AN AFFIDAVIT WAS UNWISE OR UNWARRANTED ARE CLEARLY INCORRECT AND SHOULD BE DISREGARDED.

Allison further contends that the District Court's requirement of an affidavit from him was rightly rejected by the Court of Appeals. This is an important fact in this case because his failure to obtain one casts even further doubt on the validity of his claim. His arguments should be rejected by this Honorable Court as erroneous.

His first error is the charge that the Magistrate required the affidavit in an attempt to avoid a hearing. Although the motivation of the Magistrate has never been expressed to the undersigned, it seems contrary to what Allison says it is. Had the Magistrate been motivated by the desire to avoid a hearing, he could have simply relied on Allison's no-promises statement and the large amount of authority backing it set out in the State's leading brief at pp. 15, 16. Therefore, this imputation of malevolent intent should not be accepted.

His second error is a charge that the Magistrate's requirement of affidavits was unwise because a number of unwarranted assumptions underlay it. These include assumptions that Allison's witness was a willing one, when it was his co-defendant who had received an erroneously low sentence and might not want to make waves; that the witness was concerned enough to go to the trouble and make the affidavit or knew how to make it; that there would be no mail difficulties in getting an affidavit from him at a different camp; that his custodian would not resent it and pressure him because the action was against another warden. This catalog is unconvincing. None of the above were known at the start and to the extent any of them existed, the Magistrate could expect Allison to let him know about them. He, in fact, did so with regard to mail and

notary difficulties (App p. 28, 21, 22). The appearance of the remainder of these suggestions for the first time in this argument demonstrate their after-thought nature and highlights the fact that they were not generally a problem in this case. Therefore, they should not color the Court's decision on this matter.

Another error is Allison's assertion that the State Attorney General's Office should have ordered the prison department to obtain this affidavit for him. This is a frivolous assertion giving the Attorney General's Office representation of the opposing party in such cases; its desire not to assist in either the clogging of the courts or in the procurement of what would most likely be perjured testimony; the prison department's desire to avoid pressure on prisoners unrelated to institutional and correctional goals; the general distaste of everyone for forced testimony; and the assured resulting boomerang were the witness to refuse to give the affidavit or if it were not to meet Allison's expectations. It takes little imagination to hear a charge of tampering with the evidence being made in the latter regard. Therefore, the Magistrate wisely did not attempt to involve the Attorney General on Allison's behalf.

Allison also erroneously describes the use of affidavits as administrative convenience and asks the Court to downgrade it in its decision on this case. Administrative convenience is no more an apt description of what is involved here than it is in any other case where factual allegations have been decided, and there is some limitation on rehearing such as *res judicata* or collateral estoppel. Instead, what is involved is the natural desire for repose and the utilization of the judicial resources of trial time and personnel. Disregard of the finite nature of the last, and the other demands constantly made on them (mostly by those who have not previously sworn under oath in a court proceeding to the opposite of what they now claim) is counter to the spirit of the decision of this Court in *Sanders v. United States*, 373 US 1 (1963), which prohibits successive claims. Moreover, Allison's arguments leave the

impression he is relatively disadvantaged by this approach. This is most certainly not so. The limitations on the use of prior state determinations as a bar to federal habeas corpus actions single out his class for favored treatment. Non-criminal citizens' claims are forever barred after trial on the merits when the short period for discovering new evidence elapses. However, petitioner is under no similar disability and often even under no disability imposed by a statute of limitations. In light of this favored status, it hardly becomes Allison to charge that his claim has been sloughed because of administrative convenience and this Court should not honor such a claim.

Allison further argues that the use of affidavits, where available, to decline review of the claim is insensitive. This is an argument by emotional appeal. Denying a hearing to one who has previously sworn in court to the opposite of what he now says, and who has previously had and foregone a chance to bring out the matter he now desires to bring out, is no more insensitive than considering that against his credibility in a hearing on the merits. If there is insensitivity in a situation such as Allison's case presents, it is in the promiscuous granting of hearings to persons such as he in disregard of the needs of the rest of society to process their claims relating to personal injury, violation of civil rights, and commercial loss somewhat faster than the average huge delays now prevalent. In light of this, insensitivity is not a substantial factor in this case.

Allison also errs in his assertion that if affidavits are allowed or if a higher threshold is required, the taint of insensitivty will touch the appellate division and that additional appellate litigation, expense and inconvenience will be engendered. The first of the above is an offshoot of the same epithetical substitute for argument mentioned in the paragraph above. The second is obviously incorrect for the State's position is that *Townsend v. Sain*, 372 US 293 (1963) dictates the result it seeks. Therefore, it offers no distinct or remarkable view which is likely to spawn more litigation in the future than that case has in the last thirteen years. The same potential for litigation

over it will exist whether or not Allison or the State wins. However, if Allison wins, there will be an increased potential for litigation on the type of factual allegations he makes. As for appellate expense and inconvenience, the large number of habeas cases now appealed would not likely decrease because of the automatic grant of hearings in such cases as this unless it is assumed that a substantial number of prisoners will prevail. That assumption has never been made before and the State does not find that Allison makes it in this case (*cf.* his discussion of the improbability of this type claim). Further, informal appellate proceedings without oral arguments, and sometimes without briefs, are available under appellate rules, and this tends to minimize appellate costs and "inconvenience", if that is an appropriate word to describe the business of appellate review. In light of this, Allison's floodgates argument should have no impact on the decision in this case.

In addition to dealing with affidavits as a preliminary method, Allison also deals with their use on the merits. Affidavits were not so used here because the merits were not reached. Therefore, the State believes the matter is academic and not before the Court at this time. However, Congress has authorized affidavits in the discretion of the courts, 28 USC 2246. Therefore, this matter should be of no concern to the Court in coming to a decision in Allison's appeal.

In light of the foregoing, the District Court's use of affidavits was entirely proper. Therefore, its approach should be endorsed by this Honorable Court.

IV

ALLISON'S RESPONSE TO THE STATE'S ARGUMENTS DEALING WITH RELATIVE FAULT, THE FUNCTION OF THE CRIMINAL JUSTICE SYSTEM, AND THE POSSIBILITY OF INVALIDATION OF PLEAS ARE CLEARLY INCORRECT AND SHOULD BE DISREGARDED.

Allison concludes the last section of his brief with a subsection in response to the State's arguments. It should not influence the Court's decision in this case.

Allison's most serious charge is that society's interest and the relative fault of its representatives are irrelevant to the issues in this case, a stance required of him since he is so grievously at fault. This is most surely wrong. First, he is preceeding in part under the Fourteenth Amendment Due Process Clause, which is a limitation on government, not private, action and on arbitrariness in government action. Neither of these exists in Allison's case if there is no government fault. Second, it is society and its governmental representatives that Allison wants to pick up the tab for his mendacity. Under our system of laws, it would ordinarily be expected that fault on the State would be a prerequisite to this. Because no government fault is shown here but instead Allison caused the situation of which he now complains, his interest should definitely be subordinated to society's. Accordingly, this Honorable Court should consider this factor.

Allison further asserts that an alternative analysis is the proper one — whether or not enforcing the plea is fair to the accused when it is made on an unfulfilled expectation of leniency. However, fairness should not be judged in the vacuum of the accused's desires alone, but instead should be judged in the light of the interests of all the parties to the criminal process. From that expanded view, it is most certainly fair to allot the finite judicial resources of trial time and personnel on a basis which excludes duplicative effort as frequently as it can. Further, it is most certainly fair (and a common theme in law) for a party who has brought about his own situation to be stuck with it. As a consequence of both of these, it is most certainly fair to reject Allison's argument that he really has not had a hearing because he lied at it for his own advantage, thereby causing it to go awry; and it is fair to require him to give a realistic indication of proof of government chicane or error beyond his own facile testimony before rehashing the

matter. Allison's well-written prose should not obscure the real fact basic to decision in this case — that he has already had a hearing on this matter and he subverted it. Therefore, this Court should apply the burdens of *Townsend v. Sain, supra,* to petitioner's claim, rather than singling it out for special favorable treatment.

Allison finally contends that the State has raised the spectre of wholesale invalidation of its pleas. It has not. If that were the State's concern, it could not claim its hearing procedure was adequate or that men such as Allison should not be heard anew. Instead, what the State has raised is the possibility of a large scale challenge, with the concomitant of a hearing on each such claim as required by the Fourth Circuit. Allison's concluding rhetorical questions do not meet this issue. With regard to the likelihood of challenges to pre-1974 convictions (more accurately pre-1976, since that is the date a single form was again instituted), it cannot have been anything but increased by the Fourth Circuit having swept away any natural reticence on a prisoner's part to bring forth such a claim. This Court's endorsement of the Fourth Circuit would certainly be expected to add to this in other sections of the country. In answer to Allison's questions about the credibility of such challenges, acceptance of his view on the effect of improbability on the decision to grant a hearing necessarily tosses this out as a consideration. If these challenges are not likely to be credible, and they are not, then this ought to weigh against a hearing, not in favor of it as Allison argues.

CONCLUSION

For the reasons expressed in its leading brief, and the arguments and observations above, your petitioners again request that the decision of the United State Court of Appeals for the Fourth Circuit in this case be reversed, and this is the relief to which your petitioners believe themselves entitled.

Respectfully submitted,

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